IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1028 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ASHVINKUMAR GUNVANTLAL JOSHI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1028 of 1992

MRS MADHUBEN SHARMA for the appellant

MR KG SHETH, APP for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 17/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

In this appeal, which is filed under section 374(2) of the Code of Criminal Procedure, 1973, the appellant has assailed the judgment dated August 5,1992 rendered by the learned Additional Sessions Judge, Sabarkantha at Himatnagar, in Sessions Case No.39/91, by which he is convicted of the offences punishable under section 302 as well as section 498-A of the Indian Penal Code and punished with rigorous imprisonment for life for the offence punishable under section 302 I.P.C. and rigorous imprisonment for one year for the offence punishable under section 498-A I.P.C. We may state that both the sentences are ordered to run concurrently.

2. The name of the complainant in this case is Harshaben Pushpavadan Jani. The incident in question took place on January 10, 1991 between 8.30 A.M. and 16.00 hours at the residence of the appellant. The parents of Harshaben were residing at Khedbrahma where her marriage had taken place with the appellant 14 years before the date of the incident. The appellant is a resident of village Radhivad, Taluka : Khedbrahma, District : Sabarkantha. After the marriage, complainant Harshaben was residing with the appellant at village Radhivad. At the time of her marriage, the complainant had passed S.S.C. Examination and after marriage, she had undergone nursing course. On completion of nursing course, she was appointed as Health Visitor at village Paroya of Khedbrahma Taluka and was commutting between village Radhivad and village Paroya for the purpose of service. During the subsistence of the marriage, Harshaben had given birth to three children. The eldest was a baby boy, who had expired on the next day of his birth. After a period of two years, she had given birth to a girl child named Soniya and thereafter in the third year,she had given birth to another girl child who was named Roopa. The appellant had suspicion that his wife Harshaben was having illicit relations with one muslim of village Paroya and on the suspicion that he was not the father of any of the children, he was subjecting complainant Harshaben to physical and mental cruelty. The appellant was not only beating his wife cruelly, but also his minor daughter. The extent of cruelty meted out by the appellant to his wife was such that she was compelled to leave her daughter Soniya in the custoy and care of her mother who was residing at Khedbrahma town. However, the appellant had continued to entertain suspicion that he was not the father of minor daughter Roopa who was then aged only 9 months. When the complainant had gone to her maternal home, the appellant

had addressed several letters to her and described her as a whore and a prostitute. The appellant was ostensibly not doing any work for the purpose of maintaining his family and was depending upon the salary of his wife who was serving as a Health Visitor at village Paroya. The appellant had gone wayward and taken to consuming liquor. In order to get money from the complainant, the appellant was beating and ill-treating her. Earlier he had also picked-up quarrel with his wife regarding ornaments which were given to her by her parents at the time of her marriage. Complainant Harshaben was suffering all the tortures meted out to her in the fond hope that one day the appellant would improve and that her marriage life with the appellant would not be ruined. On January 10, 1991, complainant Harshaben had gone to village Paroya for the purpose of performing duties. It may be stated that the distance between village Radhivad and village Paroya is approximately 10 KMs. and the complainant was commutting between village Radhivad and village Paroya in a bus. Before going to village Paroya for the purpose of performing duties, complainant Harshaben had left minor daughter Roopa in the care of one neighbour named Sajanba. The cousin of the complainant is residing at village Radhivad and he had come to village Paroya and informed the complainant that her daughter had taken ill and, therefore, she should immediately come to village Radhivd. On receiving information from her cousin, complainant Harshaben had hired a rickshaw and reached village Radhivad. When she reached her house, she found that her daughter Roopa was made to lie on a wooden seat and had expired. She also found that the dead body of her minor daughter was covered with a cloth and that at that time her mother-in-law, the appellant, her brother-in-law and neighbour Bhikhabhai as well as others were there. After learning that her daughter had expired, she had made inquires with the appellant as to how the daughter had died and thereupon the appellant had replied that the deceased was daughter of another person and, therefore, he had killed her. The complainant had further made inquiry with Sajanba in whose care and custody she had left minor daughter Roopa while going to village Paroya for the purpose of performing her duties, as to what had happened and Sajanba informed her that the appellant had taken away minor Roopa from her and that Roopa was screaming, but the appellant had closed the doors from inside and thereafter the minor was found dead. The complainant had also noticed that neck of deceased Roopa had bent sidewardly and that there were abrasions on her neck. The complainant had asked her cousin Abhaybhai to call her mother. Thereafter she had gone to Khedbrahma Police Station and lodged complaint

against the appellant for the murder of her minor daughter, which was registerd by Mr. R.D.Marathe, who was then Police Sub Inspector of Khedbrahma Police Station. The Investigating Officer had visited the place of incident and prepared panchnama of place of occurrence in presence of independent witnesses. He had held inquest on the dead body of deceased Roopa and had made arrangements for the purpose of sending the dead body of deceased Roopa for postmortem examination. The investigating officer had recorded the statements of those persons who were found conversant with the facts of the case and taken into custody the letters produced by complainant Harshaben which were addressed to her by the appellant. Further the letter bearing writings of the appellant produced by Harishanker Revashanker, who was then Sarpanch of village Radhivad was also obtained by the investigating officer. The admitted writings and the letters produced by complainant Harshaben were sent to hand-writing expert for the purpose of obtaining expert opinion as to whether the letters produced by complainant Harshaben were written by the appellant or not. During the course of investigation, it also transpired that Nitinkumar Gunvantlal Joshi, who is younger brother of the appellant,had abetted the commission of offence by the appellant. After obtaining report from the hand-writing expert and ascertaining the cause of death of the deceased, the appellant and his younger brother were chargesheeted of the offences punishable under sections 302, 498-A read with section 34 of I.P.C. in the Court of learned J.M.F.C. Khedbrahma. As the offence punishable under section 302 I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court,Sabarkantha at Himatnagar for trial, where it was numbered as Sessions Case No.39/91.

3. The charge at Exh.3 was framed against the appellant and his younger brother of the offences punishable under sections 302, 498-A read with section 34 I.P.C. The charge was read over and explained to the appellant as well as his younger brother, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Harshaben Pushpvadan Jani, PW.1 Exh.14, (2) Jayamalbhai Bhikhabhai,PW.2 Exh.68 (3) Harisinh Tejsinh Vaghela, PW.3 Exh.69, (4) Bhikhabhai Mohanlal Valand,PW.4 Exh.70, (5) Babubhai Jamiyatram Trivedi, PW.5 Exh.73, (6) Dr. Ravikant Chunilal Jethva, PW.6 Exh.74, (7) Abhaybhai Bhogilal Upadyaya, PW.7 Exh.80, (8) Sajanba Kishorsinh, PW.8 Exh.81, (9) Kesharba Mankamsinh,PW.9 Exh.82, (10) Harishanker Revashanker Upadyaya, PW.10 Exh.83, (11) Amarsinh Navalsinh Chauhan, PW.11 Exh.85, (12) Sushilaben Ambalal, PW.12 Exh.87, (13)

Mohmadbhai Usmanbhai,Pw.13 Exh.88, (14) Lavjibhai Punjabhai Patel, PW.14 Exh.91, (15) Hand writing expert Umakant Vallabhram,PW.15 Exh.93, (16) Kartikbhai Pushpvadan Jani, PW.16 Exh.101, (17) Rajghar Dolatrao Marathe, PW.17 Exh.103, and (18) Ranjitsinh Pratapsinh, PW.18 Exh.104, to prove its case against the appellant and his brother. The prosecution also produced documentary evidence, such as arrest panchnama of the appellant at exh.11, the complaint lodged by Harshaben at exh.15, reply given by Harshaben to the notice of the appellant at exh.62, letters addressed by the appellant to his wife at exhs. 16, 17, 18 & 19, inquest panchnama at exh.71,panchnama of place of occurrence at exh.72, postmortem notes of the deceased at exh.76, letter containing hand writings of the appellant and produced by witness Harishanker at exh.84, panchnama regarding specimen signature of the appellant at exh.90, report of hand writing expert at exh.98 etc. in support of its case against the appellant and his younger brother. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant and his brother the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by section 313 of the Code of Criminal Procedure,1973. In their further statements, the appellant and his brother denied the case of the prosecution, but did not examine any witness in support of their defence.

4. The learned Sessions Judge noticed that no direct evidence was tendered by the prosecution to prove case against the appellant and his brother and that the whole case of the prosecution was based on circumstantial evidence. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that minor Roopa had died a homicidal death and that her death was not accidential as was suggested by the defence. The learned Judge considered the evidence of complainant Harshaben Jani, witness Jaymalbhai Bhikhabhai, PW.2 Exh.68, witness Harisinh Tejsinh Vaghela, PW.3 Exh.69, witness Babubhai Jamiyatram Trivedi, PW.5 Exh.73, witness Abhaybhai Upadyaya PW.7 Exh.80, witness Harishanker Upadyaya PW.10 Exh.83 and witness Amarsinh Navalsinh Chauhan,PW.11 Exh.85, and found that their evidence was cogent, consistent as well as reliable. After placing reliance on the sworn testimonies of the above-referred to witnesses,the learned Judge held that it was proved by the prosecution that right from the beginning the appellant had entertained a doubt that he was not the father of any of the three children and that complainant

Harshaben was a woman of easy virtue. The learned Judge deduced that it was proved by the prosecution that because of suspicion regarding character of his wife, the appellant had subjected his wife Harshaben to physical and mental cruelty. What was held by the learned Judge was that as the appellant had firm conviction that he was not the father of minor daughter Roopa, he had strong motive to commit her murder. The learned Judge noticed that at the time when witness Abhaybhai, who is cousin of complainant Harshaben, had gone to the house of the appellant, the appellant was found all alone in the room with the dead body of the deceased and that the appellant had all opportunity to commit murder of the deceased. According to the learned Judge, it was proved by the prosecution through the evidence of hand-writing expert that the appellant had addressed 5 letters produced at Exhs. 16 to 20 to the complainant, wherein he had described the complainant as a whore and a prostitute and that sworn testimony of complainant Harshaben was corroborated in material particulars by the other evidence on record. The learned Judge thereafter considered the cumulative effect of the circumstances proved against the appellant and held that in all probability, the act of murder of deceased Roopa was committed by the appellant and the appellant alone. The learned Judge found that no reliable evidence was led by the prosecution to establish that younger brother of the appellant had either instigated the appellant to commit the crime in question or abetted him in committing murder of the deceased and, therefore, he was entitled to a reasonable benefit of doubt. In view of the above referred to conclusions, the learned Judge has acquitted the younger brother of the appellant, but convicted the appellant of the offences punishable under section 302 as well as section 498-A of the Indian Penal Code and imposed sentence which is referred to earlier, by judgment dated August 5, 1992, which has given rise to the present appeal.

5. Ms. Madhuben Sharma, learned counsel for the appellant after taking use through the entire evidence on record, pleaded that the circumstances sought to be relied upon by the prosecution are not fully established and, therefore, a reasonable benefit of doubt deserves to be granted to the appellant. According to the learned counsel for the appellant,the prosecution has failed to establish the motive for commission of crime which is one of the most important ingredients in a case based on circumstantial evidence and, therefore, the judgment impugned should be reversed. The learned counsel for the appellant extensively referred to the sworn testimony of

the complainant Harshaben and submitted that the appellant was a man of means and as he had extensive agricultural lands wherein wheat and other crops were being grown, the prosecution case that the appellant was depending upon the income of his wife and was ill-treating her for getting money from her, should have been disbelieved by the learned Judge. The learned counsel referred to the evidence of witness Sajanba Kishorsinh as well as that of Kesharba Mankamsinh and pleaded that it was not proved by the prosecution that on the date of the incident, complainant Harshaben had left her minor daughter Roopa to the care and custody of Sajanba, nor it was proved by the prosecution that the appellant had taken custody of minor Roopa from Sajanba and as vital circumstance is not proved by the prosecution, the case of the prosecution against the appellant should not have been accepted by the learned Judge. What was emphasised was that the circumstances proved by the prosecution are consistent with the innocence of the appellant and even if cummulative effect of the circumstances proved is taken into consideration, the charge of murder of deceased Roopa does not stand established against the appellant and, therefore, the appeal should be allowed. Lastly, it was contended that no independent charge under section 302 I.P.C. has been framed by the learned Judge against the appellant and therefore, conviction of the appellant is liable to be set aside.

6. Mr. K.G.Sheth, learned A.P.P. submitted that the evidence of prosecution witnesses proves beyond reasonable doubt that right from the beginning, the appellant had strong suspicion that he was not the father of any of the children begotten by Harshaben and had in fact suggested her to go for abortion when she had conceived the deceased, which in turn proves that the appellant had strong motive to commit murder of minor Roopa. The learned counsel for the respondent further pleaded that the appellant had not only gone wayward, but had developed bad habit of consuming liquor and for the purpose of getting money from his wife, he was subjecting her to mental as well as physical cruelty, which stands amply proved by the evidence of prosecution witnesses. The learned counsel for the State extensively read out the letters addressed by the appellant to his wife i.e. complainant Harshaben and urged that as the substantive evidence of Harshaben stands corroborated in material particulars by other evidence on record, no error was committed by the learned Judge of the Trial Court in placing reliance on her sworn testimony. According to the learned A.P.P., the suggestion made on behalf ofthe

appellant that the deceased had died an accidental death, was false because it is satisfactorily established that the deceased had died a homicidal death and such a false defence should be taken by the Court as an additional link established against the appellant while considering the circumstantial evidence against the appellant. The learned counsel emphasised that the appellant was found all alone in the house with the dead body of minor Roopa and as the appellant had failed to give satisfactory explanation as to the circumstances in which the deceased had died, the learned Judge did not commit any error in convicting the appellant of the offence punishable under section 302 I.P.C. According to the learned counsel for the State Government, the cummulative effect of the circumstances proved on the record of the case establishes beyond reasonable doubt that in all human probability,the act of commission of murder of deceased Roopa was committed by the appellant and the appellant alone and, therefore, the appeal should be dismissed.

7. We have taken into consideration the submissions advanced at the Bar and reappreciated the whole evidence on record. It is relevant to notice that the prosecution has not claimed that the incident in question was witnessed by any one and no direct evidence regarding commission of murder of the deceased by the appellant is tendered before the Court, except the extra-judicial confession made by the appellant before his wife, who is complainant in this case. Over and above the extra-judicial confession, the prosecution has also relied upon incriminating circumstantial evidence to prove its case against the appellant.

8. Before dealing with the circumstantial evidence on record, it would be worthwhile to notice the evidence adduced by the prosecution regarding extra-judicial confession made by the appellant with regard to commission of murder of the deceased Roopa by him, before his wife Harshaben. A confession being a species of admission, would be relevant and can be proved against the accused, unless it can be shown that there is some provision of law which excludes the proof of such a confession. Confession is a direct admission or acknowledgment of his guilt by a person who has committed a crime. It is not shown on behalf of the appellant that there is some provision of law which excludes the proof of confessional statement made by the appellant before his wife and therefore, we propose to scrutinise the evidence of Harshaben minutely to ascertain whether any confessional statement was made by the appellant as is referred to by her in her substantive evidence.

Harshaben P. Jani,PW.1 Exh.14 in her substantive evidence before the Court has stated that on information being received from witness Abhaybhai Upadyaya to the effect that her daughter had taken ill, she had come to her house in a rickshaw and had found that the deceased had died. She has further claimed in her evidence that she had made inquiry with her husband i.e. the appellant as to how the deceased had died and thereupon the appellant had replied that the deceased was not his daughter and, therefore, he had killed her. The witness has also stated that on examining the dead body, it was found that neck of the dead body had bent sidewardly and that there were abraisons on stomach and neck of minor Roopa.It is true that witness Harshaben has not referred to the extra-judicial confession made by the appellant before her, in her complaint. However, we find that the assertion made by this witness in her substantive evidence before the Court that the appellant had made extra-judicial confession before her is not challenged on behalf of the appellant at all. Though the appellant had addressed witness Harshaben in several letters as prostitute, she was staying with the appellant in fond hope that the appellant would improve and that her married life would not be ruined. In fact, in order to avoid conflict, she had left her minor daughter Soniya aged about 2 to 3 years in the custody of her mother at Khedbrahma and at the time of incident she was residing with the appellant. Thus, there is no reason for her to make false assertion before the Court that the appellant had made extra-judicial confession before her. The evidence of complainant Harshaben read as a whole inspires confidence of the Court. On perusal of her evidence, it becomes at once evident that it has a ring of truth. Therefore, merely because the extra-judicial confession is not referred to by her in her complaint, that itself cannot be a ground to disbelieve her statement on oath before the Court that the confessional statement was made by the appellant as narrated by her in her evidence. It is well settled that complaint is not an encyclopaedia and all minute details need not be mentioned in the complaint. One cannot ignore the mental state of affairs of the complainant when she had gone to the police station for lodging the complaint. She had lost her child in a cruel murder which had taken place in her house. Further, she was being taunted constantly as prostitute by her husband i.e. the appellant and was being hated. Under the circumstances, to insist and expect that she should have stated all the details in her complaint is to ignore the realities of life. Therefore, omission to mention the said fact in the complaint cannot be given undue importance, nor can be blown out of

propotion as is sought to be contended by the learned counsel for the appellant. Having regard to the facts and circumstances of the case, we are satisfied that the evidence led by the prosecution regarding extra-judicial confession narrated by witness Harshaben is trustworthy and can be acted upon. There is neither any rule of law nor of prudence that evidence furnished by extra-judicial confession cannot be relied upon unless corroborated by some other credible evidence. Though the Court has considered the evidence of extra-judicial confession as a weak piece of evidence, the same can be acted upon if the evidence about extra-judicial confession comes from the mouth of witness/witnesses who appears to be unbiased, not even remotely and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused. In State of U.P. v. M.K.Anthony, AIR 1985 SC 48, while explaining the law relating to extra-judicial confession, the Supreme Court has ruled that if the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction. According to the Supreme Court, in such a situation, to go in search of corroboration itself tends to cast a shadow of doubt over the evidence and if the evidence of extra-judicial confession is reliable, trustworthy and beyond reproach, the same can be relied upon and a conviction can be founded thereon. Here in this case, it is proved by the prosecution that the complainant as such was not on inimical terms with the appellant at all and in spite of cruelty meted out to her and suspicion having been exhibited by the appellant regarding her character, she was staying with the appellant and was performing her duties at another place. After subjecting the evidence of witness Harshaben to a rigorous test on the touchstone of credibility, we find that extra-judicial confession referred to by the witness is reliable and can be accepted. The claim of witness Harshaben that the appellant had made such a confessional statement, deserves acceptance because the appellant had exhibited sheer contempt for little child and even before her birth had suggested to witness Harshaben to go for abortion and therefore, in a concious effort to stifle the pricked conscience as well as in order to exhibit sheer contempt and hatred for the complainant and the deceased, the appellant must have admitted before the complainant that the deceased was not his daughter and, therefore, he had

killed her. The extra-judicial confession referred to by witness Harshaben is clear, unambiguous and specific. Her evidence establishes that the confessional statement made by the appellant was voluntary and free from influence. It is not the case of the appellant that he had made confessional statement under inducement, threat or promise by complainant Harshaben. Thus, by leading satisfactory evidence, the prosecution has proved that extra-judicial confession was made by the appellant before complainant Harshaben wherein he had in no uncertain terms admitted that he had killed deceased Roopa. We now propose to consider the circumstantial evidence led by the prosecution against the appellant.

9. The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances cannot fail. Therefore, many a times it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established, should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis except the one to be proved. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is, or are not decisive. Where a case rests squarely on circumstantial evidence, the various sets of circumstantial evidence should be taken into consideration and their total effect should be

such that they must lead unerringly to the guilt of the accused. Each fact much be proved individually and only thereafter the sum total of the proved facts has to be taken into consideration, but this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must prove each and every hypothesis suggested by the accused, however, extravagant and fanciful it might be. In Sharad v. State of Maharashtra, A.I.R. 1984 S.C. 1622, after referring to earlier case-law, the Supreme Court has summarised the conditions to be fulfilled in a case based on circumstantial evidence as under : (i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established, (ii) the fact so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (iii) the circumstances should be of conclusive nature and tendency; (iv) they should exclude every possible hypothesis except the one to be proved; (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused; and (vi) where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court.

10. If the aforesaid various conditions are fulfilled, only then a Court can use a false explanation or a false defence as an additional link and not otherwise. As observed earlier, if the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way. It has to consider the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and someof these links may have to be

inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, to human conduct and their relations to the facts of the particular case.

11. In the light of the above-referred to principles, we will now consider the question whether the case against the appellant is proved or not.

11.1 The first circumstance sought to be proved by the prosecution against the appellant is that though complainant Harshaben was his legally wedded wife, the appellant had strong suspicion that she had given birth to three children through a muslim of village Paroya and that she was leading an immoral life. Complainant Harshaben Jani, PW.1 Exh.14 in her examination-in-chief has stated that during the subsistence of her marriage with the appellant, she had given birth to three children, but the appellant had strong suspicion that he was not the father of any of the three children. The witness has stated before the Court that in view of the suspicion entertained by the appellant, the appellant was subjecting her to physical cruelty and was beating her severely. According to this witness, the appellant always used to address her a whore and prostitute and that the appellant was subjecting her to physical cruelty after consuming liquor. According to this witness, as the appellant had firm conviction that he was not the father of any child, he was also beating girl Soniya who was then aged two years and, therefore, she had left her daughter Soniya in the care and custody of her mother at Umedgadh. The witness has informed the Court that when she had conceived Roopa, at that time she was residing at village Radhivad with the appellant and that birth of Roopa had taken place in a dispensary situated at Khedbrahma town, where she had gone from village Radhivad. The witness has further mentioned in her deposition before the Court that the appellant was not earning at all and was depending on her income and was also beating her in order to get salary from her. We may state that this witness has been cross-examined on behalf of the appellant, but nothing has been brought on record so as to cast doubt about her version that the appellant had strong suspicion that he was not the father of any of the three children and that he was subjecting the complainant to physical as well as mental cruelty. The fact that the appellant had doubt about paternity of deceased Roopa is also mentioned by the complainant in her complaint which is produced on record of the case at Ex.15. In the complaint also the complainant has stated that she was off and on beaten by the appellant, as the

appellant had suspicion that he was not the father of the deceased and that the appellant was threatening to kill the deceased and had also tried to throttle her neck. Thus, the substantive evidence of the complainant stands corroborated by the averments made by her in her complaint. Further the claim of the witness that the appellant had strong suspicion about paternity of three children and was subjecting the complainant to physical as well as mental cruelty is reflected in Exh.62, which is reply dated January 16, 1987 given by the complainant to the notice dated January 2, 1987 addressed by the appellant. Moreover, we notice that witness Jayamalbhai Bhikhabhai, P.W.2 Exh.68 in his evidence before the Court has stated that Harshaben was subjected to physical and mental cruelty by the appellant after consuming liquor when Harshaben was refusing to hand over her salary to the appellant. The claim made by this witness before the Court has almost gone unchallenged. The evidence of witness Babubhai Jamiyatrao Trivedi,PW.5 Exh.73 shows that formerly he was a Talati of village Radhivad and that at the relevant time one Haribhai Revashanker Upadyaya was the Sarpanch of the village, whereas the appellant was the Deputy Sarpanch of village. This witness in his substantive evidence before the Court has stated that he was knowing the appellant as well as complainant Harshaben and that the appellant was beating Harshaben off and on saying that minor Roopa was not his daughter. According to this witness, in his presence the appellant had beaten Harshaben and, therefore, he had scolded the appellant and asked him not to beat Harshaben, but the appellant had told this witness that the girl was not begotten through him and therefore, he would kill her at any time. This witness has also informed the Court that two years before the date of the incident, a quarrel had ensued between the appellant and his wife regarding gold ornaments and a compromise was arrived at only after gold ornaments were handed over to the appellant. The claim of this witness that the appellant had in his presence beaten his wife-complainant Harshaben, as he was entertaining a suspicion that deceased Roopa was not his daughter, is not shaken at all during the course of his cross-examination. No major contradictions have been brought on record of the case so far as this witness is concerned and, therefore,it is safe to rely upon the evidence of this witness, who has no reason worth the name to state false facts against the appellant. The evidence of witness Abhayabhai Bhogilal Upadyaya, PW.7 Exh.80 also establishes that Harshaben is his cousin sister and that Harshaben had informed him that she was being beaten by the appellant. This part of the evidence of witness Abhaybhai Upadyaya is not

challenged at all. The evidence of witness Kartikbhai Pushpvadan Jani PW.16 Exh.101 shows that he is the real brother of Harshaben and that Harshaben had informed him and his mother that she was being subjected to physical as well as mental cruelty by the appellant on the ground that deceased Roopa was not begotten through him. The evidence of this witness further shows that Harshaben had also informed this witness that on first of every month she was beaten by the appellant because she was resisting the move of the appellant to take amount of salary from her. According to this witness, on one occasion he had persuaded his sister Harshaben to lodge complaint and, therefore, complaint Exh.60 was lodged requesting the police authorities to give protection to his sister. The witness has further stated in his deposition that when his sister Harshaben had gone to village Radhivad at the place of the appellant, the appellant had beaten her sister severely and, therefore, his sister had come back crying and demanded gold ornaments to be handed over to the appellant and that the gold ornaments were handed over to the appellant in presence of leading persons of the community. The witness has also stated that the appellant had addressed obscene letters Exhs.53 to 57 to him and that in those letters the appellant had specifically claimed that he was not the father of any children begotten by Harshaben. We may observe that though this witness has been cross-examined on behalf of the appellant, nothing could be elicited so as to destroy the version of this witness as stated by him in his examination-in-chief.

11.2 In order to substantiate the claim advanced by her in her deposition that the appellant had strong suspicion that he was not the father of deceased girl, complainant Harshaben has produced letters Exhs.16 to 19 addressed to her by the appellant. We may state that the admitted writings of the appellant contained in the letters produced by witness Harishanker Upadyaya PW.10 Exh.83 and the letters produced by complainant Harshaben as well as other letters produced by witness Kartikbhai jani were sent to hand writing expert Mr. Umakant Vallabhram Upadyay for opinion as to whether the letters produced by the witnesses were in the hand writings of the appellant or not. The evidence of hand writing expert Umakant Vallabhram Upadyaya PW.15 Exh.93 establishes beyond reasonable doubt that the letters produced by the witnesses were written and addressed by the appellant. The evidence of hand writing expert is corroborated by contemporary record viz. his report which is produced on the record of the case at Exh.98. We may state that neither the evidence of hand writing

expert Umakant Upadyaya nor his report produced at Exh.98 is challenged by the learned counsel for the appellant in this appeal. Having regard to the facts of the case, we are of the opinion that the learned Judge has rightly concluded that it is proved by the prosecution that letters Exhs. 16 to 19 and Exhs.53 to 57 were written by the appellant. If we peruse the contents of the letters which are produced on record of the case at Exhs.16 to 19, it becomes at once clear that in every letter the appellant has addressed complainant Harshaben as a whore and a prostitute. In every letter, the appellant has stated that complainant Harshaben had relation with one muslim named Ismail of village Paroya and others. In one letter addressed to his mother-in-law, the appellant has stated that his mother-in-law as well as brothers-in-law were encouraging his wife Harshaben to lead an immoral life and substisting on the income earned by his wife from prostitution. In every letters addressed to his wife, the appellant was insisting that she should go for abortion, as he was not the father of the child conceived by her. We do not think it necessary to refer to all the letters in detail. Suffice it to say that in all the letters the appellant has used most derogatory language against his own wife and claimed that he was not the father of the deceased and that the complainant was a prostitute by profession.

12. The discussion of the above evidence establishes beyond reasonable doubt that the appellant had strong suspicion that he was not the father of deceased Roopa and that the complainant Harshaben was leading an immoral life. Further the evidence of the prosecution witnesses establishes that the appellant had threatened to kill the deceased because he had strong doubt about the paternity of the child. The evidence of complainant Harshaben proves beyond pale of doubt that in the past also the appellant had tried to strangulate the deceased. Thus, strong motive for commission of crime on the part of the appellant is proved by the prosecution beyond reasonable doubt. It is true that motive plays a vital role in a case which is basded on circumstantial evidence, but the contention of the learned counsel for the appellant that the motive in this case is not proved cannot be accepted because the prosecution by leading consistent, cogent and reliable evidence has established beyond shadow of doubt that the appellant had strong motive to commit the murder of the deceased.

13. The second circumstance which is sought to be proved against the appellant is that the appellant had opportunity of committing murder of the deceased. The

evidence of witness Harshaben establishes that on the date of incident she had gone to village Paroya in a bus for the purpose of performing her duties and that the deceased was left in the care and custody of neighbour Sajanba. Though Sajanba has turned hostile and not supported the case of Harshaben, we are of the opinion that the fact that complainant Harshaben had left the deceased in the care and custody of Sajanba stands amply proved by the other evidence on record. It is not the case of any one that Harshaben had taken minor daughter Roopa with her at village Paroya when she had gone to perform duties as Health Visitor. Further the evidence of witness Jayamalbhai Bhikhabhai, PW.2 Exh.68 establishes that when Harshaben was going to village Paroya for the purposeof performing her duties, she was leaving her daughter aged 3 years (i.e.Soniya) to his care and custody for which he was charging Rs.30/- per month. Therefore, it is reasonable to hold that with regard to deceased Roopa also compalainant Harshaben had made similar arrangement while going to village Paroya for performing duties. As proved by the prosecution witness, the appellant was not doing any work at all and was consuming liquor. Further he had hatred for minor Roopa because of the suspicion that he was not her father. Therefore, naturally complainant Harshaben would not leave minor Roopa tothe care and custody of the appellant and in such circumstances, her claim that she was leaving Roopa to the custody of neighbour Sajanba deserves to be accepted. Even witness Kartikbhai P.Jani PW.16 Exh.101 has also stated in para-3 of his deposition that his sister Harshaben was leaving the deceased in the care and custody of Sajanba, though it is brought on record of the case by way of omission that he had not given the name of witness in his police statement, but had referred Sajanba as a girl belonging to Rajput community.

The evidence of witness Babubhai Jamiyatram Trivedi, PW.5 Exh.73 also establishes that when Harshaben was going to village Paroya for the purpose of performing her duties,she was leaving deceased Roopa at the house of one Darbar, meaning thereby at the house of Sajanba and this assertion made by the witness has also gone unchallenged. In the light of the above evidence, the assertion made by complainant Harshaben that the appellant had taken custody of deceased Roopa from Sajanba has to be viewed.

The evidence of Abhaybhai Bhogilal Upadyay, PW.7 Exh.80 clinchingly establishes that immediately after the incident he had gone to the house of the appellant and

that at that time the appellant was all alone found in his house with the dead body of the deceased and that at that time there was no one in the room where the dead body was lying. This claim of witness Abhaybhai is not sought to be controverted by the defence at all. The evidence of witness Abhaybhai would indicate that he is serving as a chemist in a cement plant situated at village Hadad and that on January 10, 1991 he had to perform duties during night time. According to him, therefore, he was present at his house situated at village Radhivad during day time and on hearing the shouts that the daughter of the appellant had died, he had rushed to the house of the appellant and that at that time the appellant was all alone in the house where the deceased was found dead. According to this witness, the appellant was crying, but he had not tried to know from the appellant as to how the deceased had died and that he had informed Harshaben who was then serving at village Paroya that her daughter had taken ill and she should go to village Radhivad immediately. The claim of this witness having not been challenged, deserves to be accepted.

The discussion of the above evidence establishes that the appellant had all the opportunity to commit the crime in question and that immediately after the incident, the appellant was all alone found in the room where the dead body of the deceased was lying.

14. The third circumstances, which is sought to be proved against the appellant, is that the deceased had died a homicidal death. We may state that the defence of the appellant was that the deceased had died an accidental death and this defence was suggested to some of the prosecution witnesses. However, the evidence ofDr. Ravikant Chunilal Jethva, PW.6 Exh.74 establishes beyond pale of doubt that the deceased had died a homicidal death. The evidence of Dr. Jethva indicates that at the relevant time he was serving as Medical Officer of Cottage Hospital, Khedbrahma and that on January 10, 1991, dead body of the deceased was brought before him for the purpose of postmortem examination. According to him, the dead body was brought to him at mid-night and, therefore, he had commenced postmortem examination on January 11, 1991 at about 9.15 A.M. and completed the same at about 10.45 A.M. On external examination, the doctor had found marks of pressure on both the sides of the neck. His evidence would show that on the left side of the neck, one finger mark was seen, whereas on the left side of the neck, four finger marks were seen. According to the medical officer, the finger

marks were brown and dry and that he had also noticed one circular bruise 1 cm in diameter on the chin of the dead body. The medical officer has stated in his evidence that on internal examination, he had noticed (i) neck extravasation of blood into the subcutaneous tissues under the finger marks as well as diffusion of blood in neck veins and carotid arteries were seen. According to the doctor, brain was congested and larynx as well as trachea were congested showing haemorrhagic patches. The doctor has explained in his evidence before the Court that the liver was ruptured and the rupture of the liver is a separate injury than throttling. The doctor has further stated that the neck was first pressed by left hand and injury on the abdomen was caused by the other hand. It is also stated by the medical officer that internal injury on the liver was corresponding with the external injuries on the abdomen. The doctor produced postmortem notes of the deceased at Exh.76. In postmortem notes, the cause of death mentioned is "Asphyxia due to strangulation (Throttling) and internal haemorrhage." Though the doctor had agreed with the suggestion made by the defence that injury on the stomach could have been caused by a fall, it is not brought on record of the case that throttling or strangulation would have taken place because of a fall. There is no manner of doubt that medical evidence on record read with postmortem notes and the injuries noticed at the time of preparing inquest report establishes beyond reasonable doubt that the deceased had died a homicidal death. The suggestion made by the defence that the deceased had died an accidental death is without any substance and rightly discarded by the learned Judge of the Trial Court.

15. The elaborate discussion of the evidence on record establishes that the prosecution has proved satisfactorily and beyond shadow of doubt tht soon after the incident, the appellant had confessed before his wife i.e. complainant Harshaben that he had killed the deceased because he was not her father. Over and above the confessional statement, the prosecution has established following incriminating circumstances against the appellant beyond pale of doubt : (i) The marriage of the appellant had taken place with witness Harshaben and witness Harshaben had given birth to minor Roopa, but the appellant had strong suspicion that he was not the father of minor Roopa and was not only describing the complainant as a prostitute, but had also insisted that the complainant should go for abortion when she had conceived. Thus, there was strong motive on the part of the appellant to commit murder of deceased Roopa, (ii) At the time of incident, complainant Harshaben had gone to

village Paroya for the purpose of performing her duties, whereas the appellant was at his house and that immediately after the incident he was found in the house all alone with the dead body. This circumstance in turn establishes that the appellant had all opportunity of committing the murder of the deceased, and (iii) it is proved beyond reasonable doubt that the deceased had died a homicidal death.

16. We notice that the Supreme Court in case of Vasa Chandra Shekhar v. Poona Satya Narayana (2000)6 SCC 286 and (2) Geetha v. State of Karnataka (2000)10 SCC 72, while explaining law, relating to circumstantial evidence, has ruled that where circumstances proved are put to the accused through his examination under section 313 of the Code of Criminal Procedure and the accused merely denies the same, then such denial would be an additional link in the chain of circumstances to bring home the charge against the accused. As indicated earlier, it is proved by cogent and reliable evidence that the appellant and the deceased were found immediately after the incident in one room. Therefore, if the death occurs of the minor girl aged 9 months in suspicious circumstances, a reasonable explanation was expected from the appellant. Here in this case, the incriminating circumstances proved were put to the appellant and in his further statement recorded under section 313 of the Code he has merely denied the same. Therefore, such denial on the part of the appellant and non-explanation about the suspicious circumstances in which the deceased died, will have to be treated as an additional link in the chain of circumstances to bring home the charge against the appellant. The cumulative effect of the circumstances proved above clearly establishes that in all human probability the act of commission of murder of the deceased was done by the appellant and the appellant alone. The circumstances proved establish guilt of the appellant beyond reasonable doubt. The conclusions drawn by us from the proved facts are consistent only with the guilt of the accused and are not consistent in any manner with the innocence of the appellant.

17. The evidence of complainant Harshaben read with the evidence of other witnesses and the letters addressed by the appellant himself establishes that he had subjected complainant Harshaben to cruelty within the meaning of section 498-A of I.P.C. The evidence on record proves satisfactorily that complainant Harshaben was subjected to harassment not only on the ground that the appellant was not the father of the deceased girl,

but also because the appellant was interested in the salary earned by complainant Harshaben. This would certainly constitute guilt within the meaning of section 498-A of I.P.c. and, therefore, conviction of the appellant of the offence punishable under section 498-A I.P.C. cannot be said to be erroneous at all.

18. The contention that there is no independent charge against the appellant of the offence punishable under section 302 I.P.C. and, therefore, the appeal should be accepted is without any basis. The charge against the appellant and his brother was framed at Exh.3. A bare reading of the charge makes it manifest that the appellant was charged with murder of minor Roopa. Therefore, no benefit can be given to the appellant on the basis that there is defect in the charge framed. Even otherwise the appellant has failed to establish that so called defect has occasioned either prejudice to him or that it has resulted into any miscarriage of justice. Therefore, in view of the provisions of section 464 of the Code of Criminal Procedure, the contention based on so called defect or omission in charge cannot be accepted and is hereby rejected.

19. The net result of the above discussion is that the prosecution has proved beyond reasonable doubt that the appellant had caused murder of minor Roopa on January 10, 1991 at his house as well as subjected the complainant to cruelty and he is rightly convicted of the offences punishable under sections 302 and 498-A of the Indian Penal Code. Having regard to the totality of the facts and circumstances of the case, we do not find any substance in the appeal and the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Muddamal articles to be disposed of in terms of direction given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.) (A.H.Mehta,J.)

(patel)